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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

MAGNA MIXER COMPANY and PAUL L. KRAMER,

Cross-Petitioners,

v.

DEBORAH W. KANE and ANDREW KANE,

Cross-Respondents.

Cross-Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether this Court should grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that the doctrine of res judicata does not bar a litigant from raising a contractual indemnity claim which they failed to raise in a prior proceeding?

Whether this Court should grant certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit that the doctrine of collateral estoppel does not bar a claim for contractual indemnity when the issue of the alleged indemnitor's liability under the contract has been previously litigated?

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CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioners, Magna Mixer Company and Paul L. Kramer (hereinafter referred to as "Magna"), respectfully pray that this Cross-Petition be considered only if the Court is disposed to grant the initial Petition of Petitioners, Deborah W. Kane and Andrew Kane (hereinafter referred to as "Kanes"). In the event the Kanes Writ of Certiorari is granted, Magna prays that a Writ be issued to review that aspect of the judgment of the United States Court of Appeals for the Sixth Circuit entered on December 7, 1995, addressing the viability of the claim and issue preclusion defenses raised on behalf of Magna.

OPINIONS BELOW

The District Court for the Northern District of Ohio granted Magna's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(6) adopting the Magistrate Judge's Report and Recommendations that the doctrines of res judicata and waiver barred the assertion of indemnity claims which were not raised in prior proceedings. On December 7, 1995, the United States Court of Appeals for the Sixth Circuit affirmed on the basis that where contractual indemnity claims have been asserted against a pleader, that pleader's indemnity counterclaim arising out of the same contract must be brought in the same proceeding as a compulsory counterclaim under Fed.R.Civ.P. 13(a). Magna incorporates herein by reference the lower court's opinions as reproduced in the Appendix to the Kanes' Petition for Writ of Certiorari.

CITATION OF OFFICIAL REPORTS

The Opinion and Order of the United States Court of Appeals for the Sixth Circuit is reported at 71 F.3d 555 (6th Cir. 1995).

JURISDICTION

Judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 7, 1995. This Court's jurisdiction to consider this Cross-Petition for Writ of Certiorari from the final judgment of the Sixth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

Magna incorporates herein by reference the statement of the case as set forth in the decision of the United States Court of Appeals for the Sixth Circuit and the counter-statement of the case as contained in their Brief in Opposition to the Kanes' Petition for Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

The Sixth Circuit's decision with respect to the application of the doctrines of res judicata and collateral estoppel to the Kanes' indemnity claim is in conflict with the decisions of this Honorable Court as well as other circuits on the same matter. On appeal to the Sixth Circuit, Magna argued that under the rulings of this Court and other

circuits, the contractual indemnity claim of the Kanes was barred notwithstanding that it had not been raised previously. The Sixth Circuit held that the doctrines of res judicata and collateral estoppel are not applicable to bar the indemnity claim, which had been assigned to the Kanes, on the basis that the claim was not raised by the assignor in previous proceedings and, as such, the issue had not been litigated so as to invoke the doctrines of res judicata or collateral estoppel. However, this ruling is in conflict with federal law and case precedent as established by this Court and various circuit courts of appeals. In rejecting the claim preclusion defenses advanced by Magna, the Sixth Circuit interjected a component not heretofor imposed by federal courts, i.e., that the issue must be raised and actually litigated before res judicata will apply. Because this aspect of the Sixth Circuit's decision did not conform to existing law, this Cross-Petition should be granted if the Court is inclined to grant the Kanes' Writ.

Res Judicata

The Sixth Circuit's ruling was in contrast with other circuits which have held that the concept of claim preclusion bars the relitigation of a claim, even if the particular theories of recovery raised in the second proceeding were not actually litigated in the first action. *Shaw v. California Department of Alcoholic Beverage Control*, 788 F.2d 600 (9th Cir. 1986). Other circuits have held that a final judgment on the merits will serve as a bar to not only those claims which were raised, but will extend to preclude relitigation of any claims which could have been raised in a prior proceeding. *In re PCH Associates*, 949 F.2d 585 (2d Cir.

1991). The Sixth Circuit's analysis of the res judicata doctrine was also in contrast with this Court's decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), which recognized that a final judgment on the merits precludes the parties or their privies from relitigating issues that were or could have been raised in the previous action.

The Kanes, as assignees, are in privity with Triumph. Thus, the relevant inquiry is whether Triumph could have raised the indemnity claim, not, as the Sixth Circuit held, whether the Kanes could have raised Triumph's indemnity claim in the previous litigation. The Sixth Circuit correctly noted in its opinion that Triumph possessed its indemnity claim against Magna at the time that Magna filed its Third-Party Complaint. *Kane*, 71 F.3d at 562. Following this Court's rulings, which conflict with the Sixth Circuit's opinion, under the doctrine of res judicata, an assignor's failure to raise a contractual indemnity claim when it could have been litigated binds its assignees, as its privies, and bars the relitigation of the claim.

In addition, under the Kanes' theory of liability against Magna in the first lawsuit in Pennsylvania, Magna's obligation to indemnify Triumph must have been raised pursuant to Pennsylvania's successor liability law which controlled the action. The Kanes argued that Magna had expressly assumed Triumph's liabilities under the Asset Purchase Agreement, the very same document which establishes Magna's obligation, if any, to indemnify Triumph. Accordingly, Triumph's indemnity claim is the very same issue which was previously raised by the Kanes.

Collateral Estoppel

The Sixth Circuit's decision that Magna's contractual obligation to indemnify Triumph was neither raised nor resolved in the Pennsylvania action is in conflict with this Court's ruling on the doctrine of collateral estoppel as well as rulings of other circuits. This Court has held that the doctrine of collateral estoppel will preclude relitigation of both issues of law and issues of fact where those matters have been conclusively determined in a prior action. *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). The decision of the Federal District Court for the Western District of Pennsylvania clearly decided Magna's obligations under the Asset Purchase Agreement upon consideration of a Motion for Summary Judgment which constitutes a final judgment "on the merits". *Dowd v. Society of St. Columbians*, 861 F.2d 761 (1st Cir. 1988). Accordingly, the issue of Magna's obligations under the Asset Purchase Agreement was integral to the determination of the Pennsylvania lawsuit. The Sixth Circuit's analysis that the issues resolved in the Pennsylvania action do not have a preclusive effect on the subsequent litigation is in conflict with the rulings of this Court and other circuit courts.

The effect of the Sixth Circuit's opinion will be to essentially emasculate the purpose underlying the doctrines of res judicata and collateral estoppel. This Court has held that the doctrine of res judicata is a rule of fundamental and substantial justice which ensures the finality of decisions by encouraging reliance on prior judicial determinations and barring vexatious attempts to relitigate controversies. *Brown v. Felsen*, 452 U.S. 127, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979). Res judicata fosters

public policy by dictating that there be an end to litigation, and that those who have contested an issue shall be bound by the result of the contest, and that matters once litigated shall be forever considered as settled between the parties. *Moitie*, 101 S.Ct. at 2429. Even though the issue of the Magna's obligation to indemnify had been previously raised, argued and decided, the Sixth Circuit held that neither res judicata nor collateral estoppel are applicable to bar the claim. It is foreseeable that based upon this deviation from well-established rulings of this Court as well as other circuits, litigants will attempt to undermine the reasoning that supports these doctrines. Litigants will use the Sixth Circuit's opinion as a wedge to pry open the doors of the courthouse which they have previously had the opportunity to enter, regardless of whether they exercised that opportunity. Accordingly, litigants will never know when they have finally put a claim or issue to rest or when they will be subject to relitigate claims and issues that have conclusively been determined in their favor.

CONCLUSION

For the reasons stated herein, Magna prays that this Court grant a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit conditioned upon the grant of certiorari for the Kanes.

Respectfully submitted,

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